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No. 93-__

In the Supreme Court
OF THE
United States

July Term, 1993

SEA-LAND SERVICE, INC.,

Petitioners,

vs.

CLARENCE F. TINSLEY and MARION TINSLEY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit Court of Appeals has affirmed a judgment holding the shipowner liable when a chief mate was injured by a condition which remained a hazard solely because the chief mate neglected his duties over a period of years. The Ninth Circuit also affirmed an order awarding postjudgment interest before the shipowner had been judged liable for the hazardous condition. Sea-Land's Petition for Writ of Certiorari presents the following questions for review:

1. Should a chief mate be held to a higher standard of care than ordinary seamen in determining the extent to which the shipowner should be held responsible for injuries which the chief mate suffered because of conditions for which he was responsible.

2. Can post-judgment interest accrue under 28 U.S.C. §1961 before the trial court has apportioned liability.

LIST OF PARTIES

The petitioner in this Court is Sea-Land Service, Inc. The action was originally brought against Sea-Land Corporation, of which Sea-Land Service, Inc., was a wholly-owned subsidiary. Sea-Land Corporation was subsequently merged into Sea-Land Services, Inc. Respondents in this Court are Clarence F. Tinsley and Marion Tinsley, husband and wife. There were no other parties in the lower court proceedings.

RULE 29.1 STATEMENT OF RELATED CORPORATIONS

Petitioner is a wholly-owned subsidiary of CSX Corporation. CSX Corporation has many other subsidiaries, all of which are wholly-owned. Sea-Land Service, Inc., also has numerous subsidiaries, all of which are wholly owned.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court

of Appeals for the Ninth Circuit entered in these proceedings on February 16, 1993.

JURISDICTION IN THE COURTS BELOW

Respondents brought this action under the Jones Act, 46 U.S.C. § 688, and general maritime law, to recover for damages allegedly suffered by Clarence Tinsley ("Tinsley") while employed as a chief mate on the vessel GALVESTON, operated by petitioner. The District Court exercised jurisdiction under 28 U.S.C. § 1333(1). The District Court entered its final judgment in favor of respondents on May 30, 1991. The Court of Appeals exercised jurisdiction over petitioner's appeal pursuant to 28 U.S.C. § 1291.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The action was first tried to the District Court on March 20, 1989. The District Court found that the vessel was unseaworthy and Tinsley was free from contributory negligence. Judgment was entered in favor of respondents on March 24, 1989, for $721,673.00.

Sea-Land appealed on April 13, 1989. The Ninth Circuit filed a Memorandum Decision on October 29, 1990, which reversed the district court's finding that Tinsley was free from contributory negligence and remanded with instructions to determine the extent to which Sea-Land's liability should be reduced on account of Tinsley's fault.

On May 29, 1991, the District Court filed supplemental findings of fact and conclusions of law which assessed Tinsley's fault at 10% and reduced the damage award to $649,505.70.[1] The District Court awarded post-judgment interest at 9.43% from its original judgment of March 24, 1989. The judgment on remand was entered on May 30, 1991. On July 12 the District Court entered Supplemental Findings of Fact and Conclusions of Law which adopted proposed findings submitted by the plaintiffs' counsel. The District Court vacated the Supplemental

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[1]Due to a computational error, the amount of Sea-Land's Liability was stated to be $654,986.70. However, the parties have agreed that the correct amount is $649,505.70, and the judgment has been satisfied in that amount.

Findings of Fact and Conclusions of law three days later without entering any new findings or conclusions.

On June 4, 1991, Sea-Land appealed from the District Court's Judgment on Remand. Sea-Land contended that the District Court's apportionment of liability was erroneous as a matter of fact and law, and the award of post-judgment interest from the date of the District Court's original judgment was erroneous as a matter of law. On November 20, 1992, the Ninth Circuit issued two decisions affirming the judgment on remand. One decision was a memorandum decision, not for publication, which affirmed the apportionment of responsibility for Tinsley's injuries. The second decision, published at 979 F.2d 1382 (9th Cir.1992), affirmed the award of post-judgment interest. Sea-Land filed a petition for rehearing on December 3, 1992, which was denied by the Ninth Circuit on February 16, 1993.

The following opinions are reprinted in the Appendix: the findings of fact and conclusions of law filed by the

district court on March 27, 1989 (A-1); the memorandum decision filed by the Ninth Circuit on October 29, 1990 (A-13); the district court's supplemental findings of fact and conclusions of law filed on May 29, 1991, the judgment on remand entered May 30, 1991 (A-34); the findings of fact and conclusions of law filed on July 12, 1991 (A-40), and the order vacating the supplemental findings (A-45); the memorandum decision filed by the Ninth Circuit on November 20, 1992, affirming the district court's apportionment of fault (A-47); the decision filed by the Ninth Circuit on November 20, 1992, affirming the district court's award of post-judgment interest (A-61); and the Ninth Circuit's order of February 16, 1993, denying respondent's petition for rehearing (A-71).

JURISDICTION OF THE SUPREME COURT

This Petition for Writ of Certiorari seeks review of the two decisions filed by the Ninth Circuit Court of Appeals on November 20, 1992, under the caption Clarence F.

Tinsley and Marion Tinsley v. Sea-Land Corporation, No. 91-35762. Sea-Lands' petition for rehearing from those decisions was denied on February 16, 1992. Sea-Land's Petition for Writ of Certiorari invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY INVOLVED

Although this action was originally brought under the Jones Act as well as general maritime law, the district court did not find that Sea-Land was negligent. The sole basis for liability is unseaworthiness under general maritime law. Consequently, the Jones Act is not involved in this petition. The only statutory authority involved is 28 U.S.C. §1961(a), captioned "Interest", which provides as follows:

> (a) **Interest shall be allowed on any money judgment in a civil case recovered in a district court.** Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. **Such interest shall be calculated from the date of the entry of the judgment,** at a rate equal to

> the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average weekly accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges. (emphasis added)

STATEMENT OF THE CASE

I.

INTRODUCTION

Tinsley's injury occurred while the vessel GALVESTON was transporting refrigerated containers on deck from Kodiak, Alaska, to Tacoma, Washington. The containers were stowed three tiers high at Hatch No.4. Tinsley fell while attempting to read the temperature gauge on a third-tier container. Respondents alleged that the GALVESTON was unseaworthy, and Sea-Land was negligent, in that there was no catwalk affixed to the stacking frame supporting the third-tier containers at Hatch

No.4. Sea-Land contended that Tinsley's injuries were caused solely by his long-standing neglect of his duties as chief mate.

II.

FACTUAL BACKGROUND

A. Tinsley's background and experience. - Tinsley was a seaman with approximately 40 years' experience. He was the chief mate on the GALVESTON at the time of his injury, and had occupied that position for several years.

B. The stowage of containers on the GALVESTON. - The GALVESTON was employed year-around in the transportation of refrigerated containers between Tacoma and Kodiak. The containers were stowed on deck in tiers. The first tier was loaded directly onto the hatch covers. Portable stacking frames were placed across the top of the first tier, with separate stacking frames for each hatch. The second tier of containers was loaded into the stacking frames. Containers were not usually stowed at

the third tier of Hatch No. 4. However, there were a few voyages every summer when containers would be stowed at that location. At such times the third-tier containers were loaded onto portable stacking frames in the same manner as the second tier containers. Catwalks were welded onto the stacking frames used for the second tier containers, but not the stacking frame used for third-tier containers at Hatch No.4. This was the basis for the trial court's finding of unseaworthiness.

C. Tinsley's ability to anticipate the unseaworthy condition. - Tinsley testified that he had climbed the third-tier containers at Hatch No. 4 "hundreds of times" before his injury, and knew before the start of each year that there would be a few voyages every summer when the vessel would carry third-tier containers at Hatch No. 4.

D. Tinsley's responsibility for safety. - As chief mate, Tinsley was the officer who was assigned responsibility for the safety of working conditions on deck and in

connection with the ship's cargo. He was the officer upon whom Sea Land relied to correct dangerous conditions aboard ship or report them so that they could be corrected by shore-side personnel.

E. The circumstances of Tinsley's injury. - Tinsley's purpose in climbing to the third-tier containers was to read the temperature gauges at the end of each container. Ladders were built onto the ends of each container. Tinsley's method was to climb the second-tier container ladder, reach around the stacking frame, and climb onto the third-tier container ladder. He slipped and fell while reaching around the stacking frame to the third-tier container ladder at Hatch No. 4.

F. Tinsley's ability to have avoided the unseaworthy condition. - It was not necessary for Tinsley to read the temperatures of the third-tier containers. While containers on the first and second tiers were frequently stuffed with chilled rather than hard-frozen cargoes, which

had to be monitored closely and maintained near the 32-degree mark, the third-tier containers were stuffed with hard-frozen cargoes. Those cargoes remained hard-frozen without being monitored on the three-day voyage from Kodiak to Tacoma. Sea-Land deliberately stowed the third-tier locations with hard-frozen containers for the specific reason that they did not have to be monitored. Tinsley knew of that practice because it was customary, and because he was given a stowage plan at the beginning of each voyage which showed the location and temperature requirements of every container on the vessel.

Moreover, Sea-Land had distributed a safety directive to all of its crewmen which stated that "Whenever circumstances (i.e., heavy weather) prohibit the normal reading of operating reefers an entry is to be made in the remarks section of the deck log indicating the time and 'Reading-Recording Reefer Temperatures not possible due to _____.'" There was conflicting testimony as to whether

the directive was triggered by the stowage of containers at third-tier locations away from catwalks. However, it is undisputed that Tinsley ignored the directive on the occasion of his injury and had never attempted to inquire as to its meaning. It is also undisputed that Tinsley had invoked the directive on prior occasions when the containers were "stowed third tier - no catwalk attached impossible to read when vessel rolling."

G. The means available to read the container temperatures safely. - Inasmuch as Tinsley chose to read the third-tier containers, there were portable ladders and temporary catwalks which he could have used to reach them. Although there was conflicting testimony as to whether such methods were practical, it was undisputed that they are customarily used throughout the American merchant marine to access higher level containers. At the time of trial Sea-Land was the only American carrier to provide catwalks on its vessels.

H. Tinsley's failure to report the dangerous condition. - If Tinsley felt that it was necessary to read the third-tier containers, and that portable ladders and stagings were inadequate, he had the duty as chief safety officer to report that fact to Sea-Land. Sea-Land required monthly safety meetings to be held on all of its vessels for the specific purpose of enabling the seamen to report conditions on the vessels which they considered dangerous. Tinsley was the officer responsible for conducting the safety meetings on the GALVESTON, keeping records of all matters reported at those meetings, and sending copies of the records to Sea-Land's shoreside managers so that they could monitor compliance with safety requirements. Yet neither Tinsley nor anyone else, on the GALVESTON or any comparable Sea-Land vessel, ever reported that the lack of third-tier catwalks at Hatch No. 4 created a dangerous condition.

I. Sea-Land's reliance on Tinsley to report the unseaworthy condition. - Tinsley admitted that if catwalks

were to be welded onto a stacking frame for use at Hatch No. 4, the welding would have had to be done by shoreside personnel. However, the danger created by the absence of a third-tier catwalk could not have been appreciated by Sea-Land's shoreside managers in the absence of a report from Tinsley. The Ninth Circuit found in its Memorandum Decision of 1990, which was decided by a different panel than the decision under review, that "Sea-Land's management undoubtedly knew catwalks were not installed at each level of all reefer stacks, but that fact alone tells us little. The crucial question is whether the absence of a catwalk at Hatch #4 should have been perceived by Tinsley's superiors as an obvious danger...The danger here was obvious only to those initiated in the rites of reefer climbing." Memorandum Decision of October 29, 1990, p.12 (emphasis in the original). It was undisputed that Sea-Land's managers had no independent basis for appreciating the dangerous condition created by the lack of third-tier

catwalks. It had never been reported to them as the cause of an injury or a dangerous condition. Thus, Sea-Land was necessarily dependant upon Tinsley to request the welding of catwalks or other measures if Tinsley believed that the condition was dangerous.

J. Sea-Land's ability to correct the unseaworthy condition. -The Ninth Circuit also found in its 1990 decision that "the defect in the ship was rectifiable; plaintiff was not confronted with a general seafaring risk of the kind courts have excused seamen from reporting - such as having to go on deck during a violent sea." Memorandum Decision of October 29, 1990, p.11. Tinsley himself testified that if the dangerous condition had been reported, catwalks could have been used at the third tier of Hatch No. 4 as easily as at other locations on the vessel. It would also have been feasible for Sea-Land to instruct Tinsley not to monitor the third-tier temperature gauges, since the third-tier containers

were hard-frozen. Either of those measures would have prevented Tinsley's injury.

REASONS FOR GRANTING THE WRIT.

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE SUPREME COURT'S POLICY OF PROTECTING SEAMEN FROM UNSAFE WORKING CONDITIONS ABOARD SHIP.

A. Standard of Review. - There is no dispute as to the nature of Tinsley's duties as chief mate, the manner in which his injury occurred, or the fact that Tinsley made no attempt to avoid the allegedly dangerous condition or complained that it was dangerous until he filed suit. Sea-Land contends that the District Court and the Court of Appeals applied an incorrect legal standard to those undisputed facts. This is an issue of law, subject to de novo review. United States v. Singer Manufacturing Co., 374 U.S. 174 (1974); United States v. Parke, Davis and Co., 362 U.S. 29, 44-45 (1960), later app. 365 U.S. 125 (1961).

B. The law of unseaworthiness must account for the means which the shipowner has to make the vessel seaworthy. - In a series of cases beginning with Mahnich v. Southern S. S. Company, 321 U.S. 96 (1944), and culminating in Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), the Supreme Court created a no-fault cause of action for seamen injured by conditions on the vessel which are unseaworthy in that they are not reasonably safe for their intended use. However, the duty to provide a seaworthy vessel cannot be considered in a vacuum. In order for that duty to achieve its social purpose, it is necessary to enforce the duty in a manner which helps to prevent the seamen from being injured in the first place. It is therefore necessary to recognize the responsibility that the ship's officers have for exercising the shipowner's duty on the vessel, and to adopt rules which prevent them from profiting from their neglect of their duties. In the present case it was purely fortuitous that the unseaworthy condition injured Tinsley and

not an ordinary seaman under his authority. If the Ninth Circuit's decision is allowed to stand, ordinary seamen will be put at increased risk of injury from the negligence of their officers.

C. As between Sea-Land and Tinsley, Tinsley was solely responsible for his injuries. - Shipowners like Sea-Land are complex organizations which necessarily contain divisions between persons who work on the ship and others with managerial authority who work ashore. The ship's officers are the persons through whom the shipowner's authority and responsibilities are exercised on the vessel. At the same time, they are the means by which information about conditions on the vessel can be passed back to the shore-side decision-makers. This function of ship's officers was placed before the courts below by the testimony of Captain Prindiville, who was fleet manager for Sea-Land's West Coast operations. Captain Prindiville gave undisputed testimony that he relied on Tinsley because:

> Chief mate primarily is the man in charge of the cargo operation. I expect him to be my arms and legs on the scene talking to the marine manager. I don't want to have to carry that cargo on the ship. That's not the reason I have a desk and office in Tacoma. The reason the chief mate is on the ship is to take care of that scene.

Tinsley's neglect of his duties would have made Sea-Land liable if another crewman had been injured by the condition which Tinsley neglected. However, as between Sea-Land and Tinsley, Tinsley was solely responsible for his injuries. Tinsley's neglect of his duties is what permitted Sea-Land to believe that the absence of third-tier catwalks was not a dangerous condition. Inasmuch as other American carriers customarily use portable ladders, stagings and harnesses to reach upper-tier containers, Sea-Land's shoreside managers could have thought that such methods were satisfactory for the crew members on the GALVESTON. They could also have thought that the built-in container ladders were safe to climb, or, in view of the safety directive and the fact that the third-tier containers

were hard-frozen, that crewmembers would have refrained from reading the third-tier container temperatures if it was unsafe to do so. Since no one in Sea-Land's employ had ever been injured by the absence of third-tier catwalks, or had ever complained that it created a dangerous condition, the shoreside managers would have had no reason to think otherwise in the absence of a report from Tinsley.

D. The legal standard applied by the Ninth Circuit was inappropriate to Tinsley's position as the officer responsible for the condition which caused his injury. - The record contains specific evidence as to certain steps which Sea-Land could have taken to avoid or correct the unseaworthy condition if Tinsley had reported it, such as installing a catwalk or instructing Tinsley not to read the third-tier container gauges. For example, Tinsley himself testified that a catwalk could have been installed at the third-tier of Hatch No. 4 as easily as at other locations on the vessel. Other witnesses testified that Sea-Land was

constantly rewelding and replacing catwalks at other locations on the vessel, and could have done the same at Hatch No.4. There was also specific testimony from Captain Prindiville, Sea-Land's manager of fleet operations, that safety was a paramount concern on Sea-Land vessels and that Tinsley was not required to read the third-tier container temperatures if he felt that it was dangerous to do so. Captain Prindiville testified further that Sea-Land followed a deliberate policy of placing the hard-frozen containers in third-tier locations for the specific purpose of relieving the seamen of the need to climb to those locations. There were also extensive safety meeting reports which showed that Sea-Land was very active in responding to safety concerns. Although some of the conditions reflected in those reports were relatively trivial, others them involved structural changes of a magnitude comparable to the welding of a catwalk onto a stacking frame. There was no evidence that

Sea-Land had ever knowingly required seamen to work under conditions known to be unseaworthy.

Nevertheless, the Ninth Circuit affirmed the district court's decision simply because the record contained some speculative testimony that Sea-Land might not have installed a catwalk or abandoned container readings if the unseaworthy condition had been reported to them. The Ninth Circuit stated that "because Sea-Land bore the burden of proof and there was no direct evidence that Sea-Land would have installed third-tier catwalks or abandoned temperature reading of third-tier reefers, the district court's finding that plaintiff's failure to report the dangerous condition was no more than ten percent of the cause of his injuries was not clearly erroneous." Memorandum decision of November 20, 1992, p.7.

Sea-Land will not ask this court to reweigh the evidence considered by the trial court, except to the extent of recognizing that the Ninth Circuit held Sea-Land to a

standard that was impossible under the circumstances and legally inappropriate for a ship's officer like Tinsley. The liability of Sea-Land should not turn on speculative testimony about what would have been done in a situation which never arose, particularly when it was the inaction of the plaintiff himself which prevented the situation from arising. It was Tinsley's own failure to report the unseaworthy condition that caused the lack of "direct evidence" cited by the Ninth Circuit. Sea-Land contends that since it produced undisputed evidence of measures which could have been taken to avoid Tinsley's injury, and Tinsley produced no "direct evidence" that Sea-Land would have refused to correct the condition if it had been reported to them, the Ninth Circuit erred as a matter of law in affirming the district court's judgment. While the standard applied by the Ninth Circuit would have been appropriate for suits by ordinary seaman, who depend upon the ship's officers for their safety, it is not appropriate when applied to the officer

who was responsible for the condition of which he complains.

In addressing Sea-Land's argument that Tinsley's position should subject his claim to a higher standard of scrutiny, the Ninth Circuit distinguished Skandalis v. M/V Galini, 1974 AMC 1671 (E.D.Va.1974), in which a second mate was barred from recovery because he failed to order other seamen to assist him in a shipboard task which caused his injury. The Ninth Circuit stated that "Plaintiff's authority is relevant only to the extent it might have been employed to avert the danger." Mem. Decision of November 20, 1992, p. 8. The Ninth Circuit failed to recognize that Sea-Land's shoreside managers were not in a position to recognize the hazard created by the lack of third-tier catwalks, and placed officers like Tinsley on the vessel for the specific purpose of informing them. Because of Tinsley's experience, expertise, and duties on the vessel, Sea-Land's shoreside managers relied upon his judgment as to which conditions were safe.

Thus, Tinsley's authority was relevant not only to avert danger during shipboard operations as in Skandalis v. Galini, but also to set in motion the process of correcting unseaworthy conditions which Sea-Land's managers could not identify from their shoreside offices. Because the Ninth Circuit's decision failed to recognize the significance of Tinsley's position on the vessel, and applied a standard of review that is inappropriate to officers such as Tinsley, the decision must be reversed.

E. This Court has recognized on other occasions that the ship's officers are subject to a higher standard of conduct than ordinary seamen. - The paternalistic attitude which the courts have adopted toward ordinary seamen depends considerably upon the extent to which they are subject to the authority of the ship's officers. In Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932), this Court held that ordinary seamen are subject to different limitations on recovery than land-based workers because:

> The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. . . The master's authority is quite despotic, and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. (Citations omitted). 287 U.S. at 377.

The nature of shipboard authority was also a basis for the holding in Socony-Vacuum Oil Co., Inc. v. Smith, 305 U.S. 424 (1939), that the assumption of risk defense which had been recognized in civil law was not applicable to actions by ordinary seamen under the Jones Act. The Court stated that ordinary seamen are subject to different policies than land-based workers because:

> The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. 305 U.S. at 430 (emphasis added)

In the present case, Tinsley was the superior officer. His authority on the vessel differentiates him from ordinary seamen and subjects him to a higher standard of conduct.

For example, it is stated in 1 Norris, The Law Of Seamen (4th ed. 1985), pp. 612-613, that:

> While an isolated incident of disobedience not of an aggravated character in a crewman may receive indulgence in the sense that a discharge would not be permitted, ships' officers are treated differently. Their higher position, greater compensation and the power and authority given to them to command others require a correspondingly higher degree of responsibility.(emphasis added)

By the same token, Tinsley's long acquiescence in the condition which he now complains of should not be indulged in the same manner that it would be indulged on the part of an ordinary seaman. The Supreme Court stated in Cortes that:

> Out of this relation of dependence and submission there emergences for the stronger party a corresponding standard or obligation of fostering protection. 287 U.S. at 377 (emphasis added).

This "obligation of fostering protection" is the obligation which Tinsley breached.

II.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER COURTS WHICH HAVE HELD THAT A SHIP'S OFFICER CANNOT RECOVER FOR INJURIES CAUSED BY HIS NEGLECT OF THE DUTIES OF HIS OFFICE.

In Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974), a chief engineer slipped on an oily engine rail. Like Tinsley, the chief engineer was responsible for safety in the area of the ship where he was working. The district court instructed the jury that the chief engineer could not recover if the injury was caused by his failure to exercise that responsibility. The court of appeals held that the jury instruction was proper and affirmed a judgment in favor of the shipowner. Comparing the case before it with Caddy v. Texaco, 292 N.E. 2d 348 (Mass. 1973), in which the seaman was allowed to recover, the Court of Appeals stated that:

> [In Caddy], a seaman was instructed to clean up oil and do some other work...here plaintiff was the one to tell himself... there must be a point where one in charge cannot give himself the wrong instruction and recover from the ship. 507 F.2d at 1323, n.2 (emphasis added).

Like Peymann, Tinsley "was the one to tell himself." If an officer is injured while attempting to repair or alleviate an unsafe condition within the scope of his duties, the officer's recovery can be reduced for contributory negligence. However, the officer's recovery should be barred altogether if he ignores a condition which could have been corrected or avoided. That is exactly what Tinsley did.

The distinction between attempting to correct a condition and ignoring it is illustrated by pairs of cases in the Second and Ninth Circuits. The Second Circuit cases are Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2d Cir. 1952), and Dixon v. United States, 219 F.2d 10 (2d Cir. 1955). Walker involved a steel filing cabinet on which the drawer catches were in disrepair. The master ignored the condition, like Tinsley, and was injured when the cabinet opened suddenly as the ship rolled. The district court sent the case to the jury on the ground that the master's negligence should reduce his recovery according to the rule of comparative

fault. The court of appeals reversed and remanded for a new trial on the ground that the jury had been instructed improperly as to the master's duties. 193 F.2d at 774. The court of appeals held that:

> In the case at bar, since the plaintiff was master of the ship, he fell within this [primary duty] doctrine. . . Thus, if the plaintiff failed to repair the catches, although he was able to do so, his failure was not only 'contributory negligence' in the first sense, but also a breach of his duty to the defendant which barred his recovery absolutely.

193 F.2d at 774.

Dixon involved a ship's ladder on which the bottom rungs were damaged. The chief mate discovered the damage and reported it, unlike Tinsley. Repairs were undertaken the following day. The master subsequently directed the chief mate to verify that the ladder had been repaired. Instead of inspecting the ladder from the bottom, and checking each rung before he used it, the chief mate inspected the ladder from the top down and was injured when some rungs gave way. The court of appeals ruled that

since the chief mate had fulfilled his duty to discover the *defective condition and initiate repairs, his carelessness for* his own safety would not bar his recovery. 219 F.2d at 17. The court stated that:

> Cases such as Walker v. Lykes Bros. S.S. Co., . . . are in no way inconsistent with the rule that assumption of risk is not a defense or comparable to the situation before us. Those cases are only instances of the firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship . . . . Such cases are quite inapposite here. [The chief mate] was not guilty of any breach of duty to his employer. 219 F.2d at 16-17.

The relationship between Walker and Dixon finds an exact parallel in the Ninth Circuit cases of Reinhart v. United States, 457 F.2d 151 (9th Cir. 1972), and Stanworth v. American Steam Trawlers, Inc., 523 F.2d 46 (9th Cir. 1975). Reinhart involved a chief mate like Tinsley, whose responsibilities included the safety of the working conditions on the vessel. Longshoremen had installed wooden

sheathing in the hold to protect the vessel's hull from being damaged by the cargo. Portions of the sheathing were broken when a particular cargo was discharged. As in the present case, the broken sheathing had to be repaired by shoreside workers rather than the ship's crew. Like Tinsley, the chief mate took no precautionary measures to eliminate the danger posed by the places where the sheathing was broken. He went into the hold to inspect rat traps required by government regulations, and was injured when he fell through a hole in the sheathing. The court of appeals affirmed the district court's holding that:

> [The Chief Mate] failed to fulfill his responsibilities as the vessel's safety officer and specifically failed to properly inspect the sheathing where his accident occurred. If he had properly performed an inspection and corrected the condition, as it was his duty to do, no accident would have occurred. The Chief Officer's faults in these respects constitute a breach of his contractual duty to defendant to properly perform his duties, and bar him from any recovery under the theory of unseaworthiness (citing Walker v. Lykes Bros.). 457 F.2d at 153, n. 2 (citing the district court's decision).

Stanworth involved a chief mate who discovered that diesel oil had spilled onto the deck of a fishing trawler, and ordered the chief engineer to clean it up. He later inspected the spill area and slipped on a patch of oil which had been missed. In holding that the chief mate was not barred from recovering for his injuries, the court of appeals stated that:

> In Reinhart . . . the accident was due to some broken and damaged sheathing about which Reinhart was aware. Although as Chief Mate he had a duty to the owner to have the sheathing in safe condition, he failed to take any action. In the present case, Stanworth had not only directed the unsafe condition to be eliminated, he was in the process of inspecting the clean-up activities when he was injured. Rather than in breach of his safety maintenance duty (as was Reinhart), he was in the process of carrying out that responsibility when the accident occurred. 523 F.2d at 47, citing Dixon, 219 F.2d at 11-12, 16, 17.

Tinsley was the opposite of Stanworth, in that he made no attempt to avoid or correct any danger created by the stowage of containers on a stacking frame which lacked a built-in catwalk. He was instead like Reinhart, Walker, and

Peymann, in that he was injured by a condition which he had ignored.

In the recent case of Bulla v. Sea-Land Service, Inc., No. 91-3204 (E.D.Pa.1993), a chief mate was injured in circumstances very similar to those of the present case. The chief mate had used an aluminum ladder to climb to the temperature gauge on a second-tier container. He then attempted to reach the gauges on adjacent containers by using lashings and other handholds to move laterally across the containers instead of using the ladder. He fell while doing so, and sued to recover for the resulting injuries. The court denied the chief mate's claims because "The plaintiff had a duty to take the temperatures in a safe way, and there is no evidence that anything the defendant did precluded his doing so." The legal standard applied by the court may not have been appropriate for an ordinary seaman, but it was certainly appropriate for the chief mate. Similarly, in Maersk Line, Ltd. v. Bernard, No. 91-3861 (C.D.Ca.1992), a chief

cook filed suit against the shipowner for injuries which he received when a box of food fell from a shelf in the vessel's freezer because it had been negligently stowed. The chief cook's position in the food storage area was analogous to that of Tinsley on deck, in that he was the officer in charge of safe stowage in the freezer. The court dismissed the chief cook's claim because his injuries were caused solely by his breach of the duties of his office.

In summary, if the absence of third-tier catwalks was indeed a dangerous condition, the danger was never communicated to the shoreside managers who could have ordered the condition to be corrected. The reason for this lack of notice is that Tinsley failed to fulfill his duty as chief mate. Moreover, Tinsley's breach of duty was an egregious pattern of continuous neglect over a substantial period of time involving hundreds of container readings. It is true that the shipowner's duties are non-delegable in the sense that the shipowner cannot hide behind the fault of an officer

when an action is brought by another seaman. However, the officer should not be allowed to recover when he acquiesces in a condition which the shipowner relied upon him to correct or report, and complains that the condition is dangerous only when he commences a lawsuit. In failing to recognize the higher standard applicable because of Tinsley's status as the officer on the ship in charge of the condition which caused his injury, the Ninth Circuit erred as a matter of law.

III.

THE NINTH CIRCUIT ERRED IN AFFIRMING THE AWARD OF POST-JUDGMENT INTEREST FROM A TIME WHEN SEA-LAND'S LIABILITY HAD NOT YET BEEN ESTABLISHED.

Post-judgment interest is governed by 28 U.S.C. §1961(a), and does not accrue under §1961(a) from the date of a judgment which is found to be legally insufficient. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990). It accrues instead from the date of the judgment on remand. Id. The

Ninth Circuit acted contrary to the dictates of Bonjorno in affirming the award of post-judgment interest from the date of the District Court's original judgment.

In Bonjorno, the Supreme Court considered the accrual date of interest on a judgment which was later modified. The Court held that post-judgment interest does not begin to accrue until the amount of damages is finally determined. The Court stated:

> [T]he purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between ascertainment of the damages and the payment by the defendant. Where the judgment on damages was not supported by the evidence, the damages have not been "ascertained" in any meaningful way. It would be counterintuitive, to say the least, to believe that Congress intended post-judgment interest to be calculated from such a judgment.

110 S. Ct. at 1576 (emphasis added, citations omitted).

The Ninth Circuit ruled that the accrual of post-judgment interest from the original judgment was consistent with Bonjorno because "the district court's determination of

damages was not challenged...." Slip opinion, p. 13576 (emphasis added). In other words, the Ninth Circuit construed Bonjorno to apply only to the amount of recovery, and not liability.

Sea-Land submits that while the specific facts of Bonjorno may have involved the quantum of damages, the holding in Bonjorno must be understood to refer to the legal obligation of the defendant to compensate the plaintiff. That obligation encompasses both liability and amount. The defendant has no obligation to compensate the plaintiff, and therefore no obligation to pay post-judgment interest, if the plaintiff's damages are not ascertained. Equally, the defendant has no obligation to compensate the plaintiff, and no obligation to pay post-judgment interest, if the plaintiff's damages resulted from a cause for which the defendant is not liable. As the Supreme Court stated in Bonjorno, "It would be counterintuitive, to say the least," to believe that while Congress did not intend post-judgment interest to run

from a judgment in which the amount of recovery was not ascertained, it intended post-judgment interest to run from a judgment in which liability was not ascertained. See 459 U.S. at 835-36.

Although the Ninth Circuit affirmed as not clearly erroneous the district court's judgment on remand that liability should be apportioned 90% to Sea-Land, that does not mean that liability was ascertained at the time of the original judgment. The Ninth Circuit's affirmation of the judgment on remand cannot apply retroactively to a time before that judgment was entered.

Sea-Land contended on remand that it could have avoided Tinsley's injury entirely by instructing Tinsley not to read the third-tier containers if Tinsley had reported the dangerous condition. Sea-Land's West Coast fleet manager gave undisputed testimony at trial that whenever the vessel had containers at locations where there were no catwalks, care was taken to place the hard-frozen loads in those

locations. He testified specifically that the reason for doing so was that the hard-frozen containers did not have to be monitored. That testimony would have been sufficient to sustain as not clearly erroneous a finding that Tinsley's injuries were caused solely by his own negligence, and that Tinsley was not entitled to recover.

Sea-Land also contended that it could have avoided Tinsley's injury by prewelding a catwalk to a third-tier stacking frame for use on the few voyages when containers were stowed on the third-tier at Hatch No. 4. In support of that contention, Tinsley himself testified that the vessel had third-tier catwalks at Hatches 8 and 9, and a catwalk could just as easily have been attached at the third tier of Hatch No. 4. Tinsley's testimony was supported by that of other witnesses who said that catwalks were constantly taken off, repaired, and replaced on the vessel, and that a catwalk could have been welded to a stacking frame for use between the second and third tiers at Hatch No. 4 as readily as at

other locations on the vessel. The record also contained substantial evidence of safety meetings and related actions demonstrating Sea-Land's responsiveness to safety concerns. The oral testimony and safety meeting records would likewise have been sufficient to sustain as not clearly erroneous a finding that Tinsley's failure to report the dangerous condition was the sole cause of his injuries.

In summary, the District Court found in its original judgment that Tinsley's failure to report the danger which he perceived from the absence of third-tier catwalks was not negligent. As a result, the District Court did not consider the extent to which Tinsley's injuries may have been caused by his failure to report the perceived danger. The Ninth Circuit reversed the District Court and held that Tinsley was negligent in failing to report the perceived danger. The Ninth Circuit concluded specifically that while Sea-Land knew of the condition, it would not have appreciated the danger created thereby in the absence of notice from

Tinsley. The Ninth Circuit instructed the District Court to consider on remand the extent to which Tinsley's injuries were caused by his failure to inform Sea-Land of the danger which he perceived. Looking at the facts from that new point of view, the District Court might well have decided that Tinsley's failure to report the perceived danger was the sole cause of his injuries, and stood as a complete bar to recovery. Such a finding would have been supported by the evidence. The fact that the District Court chose to apportion causation to Sea-Land, and the District Court's decision was later affirmed as not clearly erroneous, cannot be used retroactively to conclude that Sea-Land's liability was ascertained at the time of the original judgment.

CONCLUSION

For the foregoing reasons, review by this Court is appropriate and certiorari should be granted.

Respectfully submitted,

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